88-150

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

MONROE SYSTEMS FOR BUSINESS, INC.,
Petitioner,

vs.

WALTER L. BROOKS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623, does an employer's submission of a discredited reason for the discharge of an employee by itself constitute evidence of an intent to discriminate on the basis of age even though the reason may have been discredited for reasons unrelated to age animus?

2. Whether, absent direct evidence of age animus, a judgment that a discharge violated the ADEA may be sustained in the absence of significantly probative evidence that the employer's reason for the discharge was a pretext for age discrimination?

LIST OF PARTIES

The only parties to the proceeding are listed in the caption of the case in this Court.

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Monroe Systems for Business, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on April 26, 1989.

OPINIONS BELOW

The order of the United States District Court for the Western District of Missouri, Western Division, denying petitioner's motion for judgment notwithstanding the verdict and motion for new trial is not officially reported. (Appendix A9) The decision of the United States Court of Appeals for the Eighth Circuit is reported at 873 F.2d 202. (Appendix A22) The decision of the United States Court of Appeals denying the petition for rehearing and petition for rehearing en banc is not officially reported. (Appendix A28)

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit is dated April 26, 1989. The order denying rehearing and rehearing en banc is dated June 5, 1989. The statutory provision conferring jurisdiction on this Court to review the judgment by writ of certiorari is 28 U.S.C. §1254.

STATUTE INVOLVED

Title 29, Section 623(a):

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Title 29, Section 623(f):

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where . . . the differentiation is based on reasonable factors other than age. . .

* * *

(3) to discharge or otherwise discipline an individual for good cause.

STATEMENT OF THE CASE

I. Nature of the Case

Plaintiff Walter L. Brooks' ("Brooks") complaint alleged that his employer, Monroe Systems for Business, Inc. ("Monroe"), terminated his employment because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. 621-634 ("ADEA"), or, alternatively, in order to prevent him from fully vesting in his pension benefit rights in violation of the Employee Retirement Income Security Act ("ERISA"). (J.A., pp.8-11, Complaint)[1] Monroe moved for summary judgment. The United States District Court for the Western District of Missouri, the Honorable Joseph E. Stevens, Jr., presiding, granted summary judgment in favor of Monroe on the ERISA claim and denied summary judgment on the ADEA claim. (Appendix A2) The ADEA claim proceeded to trial before Judge Stevens and a jury returned a verdict

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1. "Appendix" refers to the appendix to this brief. "J.A." refers to the Joint Appendix in the Eighth Circuit. "1Tr." refers to the first volume, "2Tr." to the second volume and "3Tr." to the third volume of the trial transcript. "PX" refers to Plaintiff's Exhibit; "DX" refers to Defendant's Exhibit.

for Brooks. (Appendix A1) Thereafter, the District Court denied Monroe's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial. (Appendix A9) The Eighth Circuit affirmed and denied rehearing and rehearing en banc. (Appendix A22, A28)

II. Statement of Facts

Brooks worked for Monroe repairing and maintaining office machines in the service department of Monroe's Kansas City, Missouri district office. (1Tr. p.5, ls. 7-11; p.6, l.24-p. 7, l.6; J.A., p.132, PX79/DX61) Brooks' training and experience was solely in the repair of calculators, electronic bookkeeping machines and computers. Brooks was neither trained nor experienced in photocopier service and repair work. (1Tr. p.7, l.4-p.8, l.19; p.11, ls.5-25; p.66, ls.17-23)

A. Monroe's Business Strategy to Expand Its Traditional Product Line to Include Photocopiers and Computers Succeeded in the Photocopier Market, but Not in the Computer Market

Historically, Monroe manufactured, sold and serviced only electronic and mechanical calculators, adding machines, and bookkeeping machines. (1Tr. p.6, l.24-p.7, l.14; 2Tr. p.66, ls.5-11) Monroe's sales revenues in these lines were decreasing. (2Tr. p.143, l.22-p.144, l.1)

In approximately 1981, Monroe expanded its product line to the sale and service of computers. Thereafter, over a period of years, Monroe made a massive effort to succeed in the highly competitive computer market, including hiring a new national computer sales force,

hiring a large headquarters staff to create new hardware and software products, and training certain servicemen, including Brooks, to repair and maintain Monroe computer products. (1Tr. p.50, l.18-p.51, l.10; p.141, l.8-p.142, l.17; 2Tr. p.27, l.23-p.28, l.9; p.66, l.16-p.67, l.11)

Monroe also aggressively introduced a complete line of photocopiers. As in the case of the computer product line, Monroe trained certain servicemen to repair and maintain photocopiers and hired photocopier maintenance specialists at the regional level. (1Tr. p.68, ls.13-16; p.197, ls.6-16; 2Tr. p.4, l.25-p.5, l.1) All of Monroe's sales staff (other than the computer sales personnel) commenced photocopier sales. (1Tr. p.142, ls.10-22; 2Tr. p.68, l.17-p.69, l.13)

After Monroe's owner, Litton, sold Monroe to new owners in October 1984, Monroe's new owners determined that Monroe's attempt to market and service computers had failed and therefore, Monroe discontinued its computer product line. In June 1985, Monroe laid off its entire specialized computer sales force on a nationwide basis, almost entirely eliminating the need for computer service employees. (1Tr. p.8, ls.5-13; p.51, ls.8-24; p.126, l.25-p.127, l.1; p.141, l.8-p.142, l.17; p.177, ls.9-23; 2Tr. p.21, ls.17-25; p.67, l.16-p.68, l.4; p.68, ls.9-11; p.74, l.17-p.75, l.4; p.95, ls.4-9; J.A., pp. 106-07, DX17, DX18) However, Monroe continued to pursue the photocopier line which was extremely successful and was quickly becoming Monroe's most profitable product. (1Tr. p.68, ls.5-12; p.142, ls.10-22; 2Tr. p.21, ls.17-25; p.68, ls.9-16; p.143, l.13-p.144, l.1)

B. Following the Elimination of the Computer Line, and As Part of Its New Business Direction and Operations, Monroe Instituted a Reduction-in-Force of Its Service Personnel

During the summer of 1985, after ending its computer sales effort, Monroe acted to improve the productivity and efficiency of its district service departments.[2] Monroe ordered a nationwide reduction in the service labor force. Accordingly, Regional Service Operations Manager Gerald Tully, whose region included the district in which Brooks worked, planned to reduce the service personnel in his region. (2Tr. p.78, l.19-p.79, l.23) Monroe's headquarters did not give Tully any guidelines for determining where to reduce forces or who should be terminated. At no time did he receive any instructions to consider employee ages in determining who to discharge. (2Tr. p.81, ls.6-10, 15-18)

Tully selected Kansas City as one of the districts in his region for a reduction-in-force because the Kansas City district was losing money during the first half of 1985. (2Tr. p.82, l.6-p.85, l.16; J.A., p.126, DX25) Tully instructed Kansas City District Service Manager Anthony Leier to terminate one serviceman in Kansas City. He did not prescribe any guidelines for Leier to use in selecting who to terminate. (2Tr. p.90, ls.1-20)

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2. Monroe operated a nationwide system of district offices. Each district office had a sales department and a service department. The district manager was in charge of the entire district and concentrated his time in the sales effort. The district service manager was in charge of the district service department and reported to both the district manager and a regional service operations manager. (1Tr. p.109, l.25-p.111, l.6)

C. Leier Concluded That He Must Retain All Service Employees Who Were Repairing and Servicing Photocopiers

Although Leier attempted to provide an economic justification for retaining all servicemen in Kansas City, Leier concluded that the revenue levels could not support the current service complement. Because of Monroe's success in its photocopier business, Leier knew that he had to retain the servicemen who were repairing and servicing photocopiers. (2Tr. p.124, l.10-p.126, l.4; p.126, ls.17-23; p.128, ls.11-25)

In August 1985, the following servicemen were employed in Monroe's Kansas City district service department: Ron Cunningham, Harold Sechrest, Byron Taylor, Walter Brooks, Brian Munsell and Fred Taylor. (J.A., p.132, PX79/DX61) Fred Taylor clearly possessed extensive photocopier training and service experience. (1Tr. p.23, l.21-p.24, l.2; p.68, ls.21-24; p.98, ls.5-16; p.151, ls.6-21; p.197, ls.4-16; 2Tr. p.134, l.8-p.135, l.11)

Brooks and Byron Taylor (who was not related to Fred Taylor) did not have any experience or training in the repair and service of Monroe's photocopiers. Byron Taylor serviced computers and other office machines, but did not have photocopier training or experience. (1Tr. p.53, ls.7-15; p.54, ls.13-16; p.100, ls.4-20; 2Tr. p.127, ls.6-13; p.135, ls.12-15) In Brooks' case, from the beginning of his employment with Monroe in December 1977, until his discharge in August 1985, Brooks spent 90% of his time in the shop and did not have photocopy service or repair experience. During 1985, Brooks' duties were to answer the telephone in the district office and assist in scheduling other servicemen to respond to cost estimates for Monroe customers, and to repair calculators, book-

keeping machines and computers in the shop. (1Tr. p.8, ls.9-19; p.23, l.21-p.24, l.5; p.65, l.17-p.67, l.5; p.76, l.18-p.77, l.1; J.A., pp.134-35, DX32)

D. Leier Chose to Lay Off Either Brooks or Byron Taylor Who Did Not Have Photocopier Training and Experience. Leier Selected Brooks Solely Because Brooks Had Less Continuous Service Than Byron Taylor

Brooks and Byron Taylor each lacked photocopier training and experience. Leier, who at the time of trial was no longer an employee of Monroe, chose the most traditional and nondiscriminatory factor on which to base his decision as to who to terminate: continuous service according to seniority date. (2Tr. p.127, ls.6-18; p.135, ls.12-18) Byron Taylor had greater continuous service with Monroe than did Brooks. (1Tr. p.54, ls.17-25; p.79, ls.7-10; p.100, ls.4-20; p.146, ls.2-12; J.A., p.132, PX79/DX 61) Byron Taylor's seniority date was August 1975. Brooks' seniority date was December 1977. (1Tr. p.54, ls.23-25; J.A., p.132, PX79/DX61)

Although Brooks first started working for Monroe in 1956, he resigned three times during the course of his employment, in 1968, 1974 and 1977. (1Tr. p.4, ls.18-21; p.5, ls.12-19; p.55, l.10-p.57, l.24; J.A., pp.93-95, DX1, DX2, DX3) When Brooks returned in December 1977, his seniority date became December 1977, pursuant to Monroe's standard policy, which Brooks acknowledged.[3] (1Tr. p.54, ls.23-25; p.61, l.17-p.62, l.5; 2Tr. p.116, l.24-p.117, l.18)

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3. Monroe's seniority date policy was also applied to younger Kansas City employees. Employee Munsell, age 25, was hired in 1977, left Monroe in 1982, and returned in January, 1984, at which time, pursuant to the policy, Monroe assigned him a seniority date of January, 1984. (1Tr. p.155, ls.9-14; J.A., p.133, Amend. DX61)

Leier selected Brooks for termination from his job because he was the least senior serviceman without photocopier training and experience. (1Tr. p.100, ls.4-20; 2Tr. p.126, l.17-p.127, l.18; p.135, ls.12-18) At no time did Leier consider the age of any person in making the decision to terminate Brooks. (2Tr. p.123, ls.1-9; p.129, ls.8-13)

Leier informed Branch Manager Sturrock of his reasons for choosing Brooks. Sturrock concurred in the decision. Sturrock, who was one of Leier's superiors, did not tell Leier not to terminate Brooks or to terminate anyone other than Brooks. (2Tr. p.137, ls.4-7; p.146, ls. 17-20) The possibility of a violation of Monroe's policy prohibiting age discrimination did not even cross Sturrock's mind when Brooks was terminated. (1Tr. p.138, l.11-p.141, l.7; J.A., p.131, DX53) Tully approved the decision to terminate Brooks and the reasons upon which it was based. (2Tr. p.91, l.4-p.92, l.3) Tully also reviewed the regional personnel files to confirm that Brooks, in fact, had less seniority than Byron Taylor. (2Tr. p.92, l.22-p.93, l.5) Age was never considered by Leier or Tully in making the decision to terminate Brooks. They did not believe that age was relevant to the decision. (2Tr. p.98, ls.16-25; p.123, ls.1-13)

On or about August 6, 1985, Leier informed Brooks, in a private meeting in Leier's office, that Brooks would be terminated, effective August 16, 1985. (1Tr. p.4, ls.1-2; p.31, ls.1-17) Monroe never replaced Brooks; his duties were assumed by the other district servicemen, including Ron Cunningham, who was only five years younger than Brooks. (1Tr. p.182, ls.5-8; 2Tr. p.14, l.16-p.15, l.2; p.99, l.4-p.100, l.3; J.A., p.132, PX79/DX61)

E. Brooks Had No Direct Evidence That the Decision to Terminate Him Was Motivated by Age Discrimination

Brooks testified that he did not know of any statements or communications by any Monroe official to the effect that people of certain ages should not do certain kinds of work, that Monroe assigned work according to employees' ages, or that reflected any bias, prejudice or dislike of people of certain ages. (1Tr. p.48, ls.1-13; p.49, ls.22-25) Brooks also did not know of any statement to the effect that other employees were retained and he was terminated because of his age. (1Tr. p.50, ls.14-17) No witness disagreed with Brooks on these points.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's Decision Is Incorrect and in Conflict With Decisions of Other Circuits Which Correctly Hold That a Discredited Reason for an Employer's Action Is Not Tantamount to Proof of a Discriminatory Motive

There is a conflict among several Circuits of the United States Court of Appeals regarding the important issue which arises in almost all ADEA discharge cases as to whether the employer's discriminatory intent may be proven simply by evidence that the employer's proffered reason for the discharge was incredible or inconsistent.

In ADEA cases, the courts have generally adopted the burden of proof analysis applicable under Title VII of the 1964 Civil Rights Act. *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989); *Fowle v. C & C*

Cola, 868 F.2d 59, 61 (3rd Cir. 1989). The seminal case is *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973), in which the Supreme Court established that, after an employer has articulated a legitimate, non-discriminatory reason for its action, the employee must:

> demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision.

The dispositive issue is not whether the employer's reason is incredible. The dispositive issue is whether the reason is a cover-up for intentional discrimination.

In *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), this Court emphasized that, in an employment discrimination case, the plaintiff has the burden to prove not only that the proffered reason was actually pretextual, but also that the proffered reason was a cover-up for intentional discrimination. The Court observed as follows:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

450 U.S. at 256; 101 S.Ct. at 1095. Notwithstanding the "unworthy of credence" language, this Court has never held that an incredible reason, by itself, establishes dis-

criminatory intent. Simply because a person is over 40 and is discharged for incredible reasons does not violate the ADEA. The ADEA is not a wrongful discharge statute. *Holder v. City of Raleigh,* 867 F.2d 823, 828 (4th Cir. 1989). Under the ADEA, an employer can fire an employee for any reason, whether the reason is incredible or inconsistent or fair or unfair, so long as the reason is not that the employee is over age 40. *Freeman v. Package Machinery Co.,* 865 F.2d 1331, 49 FEP Cases (BNA) 1139, 1148 (1st Cir. 1988); *Kier v. Commercial Union Insurance Cos.,* 808 F.2d 1254, 1259 (7th Cir.), *cert. denied,* 481 U.S. 1029 (1987). The pretextual nature of the reason must be presented in connection with evidence of prohibited discriminatory intent. This Court has clearly emphasized that the plaintiff's burden to prove that the proffered reason was not the true reason "merges with" the ultimate burden of persuading the court that there has been intentional discrimination. *Burdine,* 450 U.S. at 256; 101 S.Ct. at 1095.

In this case, the Eighth Circuit held that the "submission by an employer of a discredited reason to discharge is itself evidence of discriminatory motive" and that "inconsistencies" regarding the "reasoning and procedure in deciding to fire Brooks" were grounds upon which to infer that the proffered "reason was pretextual." (Appendix A25) An employer's reasons for discharging an employee who is over 40 years of age may be disbelievable or inconsistent due to myriads of reasons unrelated to age animus. That the employer's reasons are a pretext to cover-up any other motivation (personality conflicts, nepotism, irrational anger) to discharge the employee is irrelevant under the ADEA because the ADEA only prohibits discharges based upon age animus. Although several other Circuits have correctly held that an em-

ployer's reasons for discharge are not discriminatory simply because they are disbelieved or inconsistent, the Eighth Circuit disagreed with this critical distinction in its ruling in this case, as it has in other cases. *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054 (8th Cir. 1988); *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061 (8th Cir. 1988). Therefore, the Supreme Court should issue a writ of certiorari to resolve this conflict and prevent the application of the ADEA in a manner which is contrary to its terms and to the intent of Congress.

The Eighth Circuit's opinion in this case that "[s]ubmission by an employer of a discredited reason to discharge is itself evidence of discriminatory motive" (Appendix A25) is in conflict with the holding of the Fourth Circuit's decision in *Holder v. City of Raleigh, supra*, 867 F.2d at 827-28, that a discredited reason for discharge is not sufficient to prove discrimination without evidence that age animus motivated the decision. In *Holder*, the Fourth Circuit relied on a 1987 Seventh Circuit ruling, and held as follows:

> Nor does the magistrate's finding that the defendants' proffered reasons may have been themselves pretextual prove plaintiff's case of racial discrimination. We agree with the Seventh Circuit that
>
> > [s]howing that the employer dissembled is not necessarily the same as showing 'pretext for discrimination' . . . it may mean that the employer is trying to hide some other offense, such as a violation of a civil service system or collective bargaining agreement. . . . It is easy to confuse 'pretext' in the more common sense (meaning any fabricated explanation for an action).

Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 559 [44 FEP Cases 1137] (7th Cir. 1987).

Similarly, a finding that the reasons proffered by defendants were, in some general sense, "unworthy of credence" does not of itself entitle plaintiff to prevail. See id. at 560. The reason for their lack of credence must be the underlying presence of proscribed discrimination. We have no authority simply to require employers to use the "best" standards and procedures available to them. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 [17 FEP Cases 1062] (1978) ("[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it"). Title VII is not a "bad acts" statute. *Benzies v. Illinois Dept. of Mental Health*, 810 F.2d 146, 148 [42 FEP Cases 1537] (7th Cir. 1987). Without proof of racial discrimination, any remedy of ours would be without warrant in the law.

Similarly, the Fifth Circuit has rejected the doctrine which was applied by the Eighth Circuit below that a disbelieved reason for an employer's conduct is "evidence of discriminatory motive." *Bienkowski v. American Airlines*, 851 F.2d 1503, 1508 (5th Cir. 1988), holds as follows:

The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated. *Cf. Bishop v. Wood*, 426 U.S. 341, 350, 96 S.Ct. 2074, 2080, 48 L.Ed.2d 684 (1976). Even if the trier of fact chose to believe an employee's assessment of his performance rather than the employer's, that choice alone would not lead to a conclusion that the employer's version is a pretext for age discrimination. More is

> required, such as "direct" evidence of age discrimination, information about the ages of other employees in plaintiff's position, the treatment and evaluation of other employees, or the employer's variation from standard evaluation practices. *Compare McDonnell Douglas,* 93 S.Ct. at 1825.

Also conflicting with the Eighth Circuit is *White v. Vathally,* 732 F.2d 1037, 1042 (1st Cir. 1984), in which the First Circuit held that a plaintiff may not meet the burden of proving discriminatory intent by simply discrediting the employer's articulated reason:

> Merely casting doubt on the employer's articulated reason does not suffice to meet to plaintiff's burden of demonstrating discriminatory intent, for "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasoning" in the first place. [*Burdine*] at 254, 101 S.Ct. at 1094. To hold otherwise would impose on the defendant an almost impossible burden of proving "absence of discriminatory motive," *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 25, 99 S.Ct. 295, 58 L.Ed. 2d 216 (1978) (per curiam); *Id.* at 29, 99 S.Ct. at 297, 298 (Stevens, J., dissenting), and would improperly revive the presumption in plaintiff's favor which was raised by the *prima facie* showing but "dispel[led]" by the defendant's articulation of reasons, *Furnco* [*Construction Corp. v. Waters*], 438 U.S. at 578, 98 S.Ct. at 2950.

The conflict among the Circuits is further evidenced by the Third Circuit's rulings in accord with the Eighth Circuit. *Chipollini v. Spencer Gifts, Inc.,* 814 F.2d 893, 899-900 (3rd Cir. 1987); *Lockhart v. Westinghouse Credit Corporation,* ..... F.2d ....., 50 FEP (BNA) 216, 220 (3rd Cir. 1989). *Chipollini* and *Lockhart* held that the

plaintiff may obtain a favorable verdict of age discrimination even if the plaintiff's proof only amounts to discrediting the employer's legitimate, nondiscriminatory reason for discipline. The Fifth Circuit specifically noted the conflict between its holdings and the Third Circuit's holding in *Chipollini*. *Bienkowski, supra,* 851 F.2d at 1508, n.6. The Eighth and Third Circuits are in direct conflict with the correct holdings of the First, Fourth, Fifth and Seventh Circuits.

The Supreme Court should issue a writ of certiorari to resolve the Circuits' conflict on this important issue which is fundamental to the resolution of almost all ADEA discharge cases.[4] The crowded federal court dockets should not be burdened with purported age discrimination suits which, in reality, are cases merely challenging the rationality or believability of employer decisions. Congress never intended that the ADEA be a vehicle for the review of the wisdom of employer decisions regarding the best way to run their business. Yet, in this case, without a requirement that the employee's proof be more than simply proof that the employer's reason for discharge is disbelieved, the ADEA is converted from a statute expressly preventing discrimination only because of age to a wrongful discharge statute applicable to people over 40. *Bienkowski, supra,* 851 F.2d at 1508, n.6. Such a result was not envisioned or intended by Congress and should not be permitted by this Court.

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4. The conflict between the Circuits has left ADEA litigants without a clear indication of the extent of their burdens of proof at trial. Indeed, a Circuit itself may seem confused at times. Compare *Burger v. McGilley Memorial Chapels, Inc.*, 856 F.2d 1046, 1047-48 (8th Cir. 1988) (citing *Pollard* for proposition that when a pretextual reason for discharge existed, jury must still find that pretext was to cover a discriminatory reason), with *MacDissi, supra.*

Absent evidence of age animus, the ADEA does not infringe upon the employer's right to choose whom it desires to employ simply because someone disagrees with, or disbelieves, the employer's reasons for acting. *See, Price Waterhouse v. Hopkins,* 109 S.Ct. 2115, 49 FEP (BNA) 954, 959 (1989) (discussing "important aspect" of Title VII as "preservation of the employer's remaining freedom of choice" and "maintenance of employer prerogatives"). While other Circuits have correctly applied the law in light of the ADEA's express language and limited purpose, the rulings of the Third and Eighth Circuits incorrectly and impermissibly lead to the misapplication of the ADEA because they permit the employer's liability to depend upon the believability of the reason for discharge, rather than upon the presence or absence of age animus.

II.

The Eighth Circuit's Decision Conflicts With the Eleventh Circuit's Holding that an ADEA Discharge Claim Is Not Proven Without Significantly Probative Evidence That the Reasons for Discharge Were a Pretext for Age Animus

Rather than eliminating the conflict among the Circuits, which is discussed above, the Eighth Circuit's recitation of various non-age related factors to support its decision intensifies the conflict and error of law. A judgment cannot be based upon a mere scintilla of evidence or based upon unreasonable inferences. *J.E.K. Industries, Inc. v. Shoemaker,* 763 F.2d 348, 353 (8th Cir. 1978); *Marcoux v. VanWyk,* 572 F.2d 651 (8th Cir. 1978). Thus, to avoid misapplication of the ADEA, the Eleventh Circuit has held that the "burden returns to the plaintiff to prove by significantly probative evi-

dence that the proffered reason is a pretext for discrimination." *Carter v. City of Miami, supra,* 870 F.2d at 584. "Conclusory" allegations that discrimination occurred are not enough to sustain the employee's burden of proof. *Id.*

Where no direct evidence of age animus exists, age discrimination discharge claims should not be established without "significantly probative evidence" that the employer's reasons for discharge were a pretext for age animus. This case offers a dramatic illustration of the injustice resulting from the failure to apply the *Carter* standard. Merely by citing workplace events which seemed illogical to the court, the Eighth Circuit incorrectly relied upon non-age-related reasons to sustain the jury's verdict of age discrimination.

As demonstrated in the following paragraphs, none of the factors cited by the Eighth Circuit amounts to "significantly probative evidence" that age discrimination occurred. As a result, Monroe is saddled with a judgment that it engaged in age discrimination which would not have been entered if the proper standard (as applied by the Eleventh Circuit in *Carter*) had been applied in this action. The ADEA was not designed to prohibit an employer's irrational errors of judgment. *Dale v. Chicago Tribune,* 797 F.2d 458, 464 (7th Cir. 1936) (while a court must closely scrutinize ADEA suits for discriminatory intent, it does not "sit as a super-personnel department" that reexamines an entity's business decisions); *Haskell v. Kaman Corp.,* 743 F.2d 113 (2d Cir. 1984) (ADEA does not bar an employer from discharging an employee based on nondiscriminatory factors, no matter how subjective or unsound). The Eighth Circuit's analysis allows irrational errors of judgment unrelated to age animus to become tantamount to age discrimination. The Eighth Circuit's misapplication of the ADEA can be remedied, and rec-

essary protection for employers can be provided as required by the ADEA, by this Court's adoption of the Eleventh Circuit's *Carter* doctrine requiring "significantly probative evidence" that the employer's reasons were a pretext for intentional age discrimination.

As a factor, the Eighth Circuit states that Brooks was described by Sturrock as an excellent worker who had received high performance ratings in each of the four years before his discharge. (Appendix A24) That Brooks was previously highly rated in his office job (but not as a photocopier repairman) cannot rebut Monroe's legitimate, nondiscriminatory reason for Brooks' termination: Brooks was the least senior person who was not a photocopier repairman. *Fowle v. C & C Cola, supra; Grohs v. Gold Bond Building Products,* 859 F.2d 1283 (7th Cir. 1988); *Jang v. Biltmore Tire Co., Inc.,* 797 F.2d 486, 489 (7th Cir. 1986); *Menzel v. Western Auto Supply Company,* 848 F.2d 327, 329-30 (1st Cir. 1988). An employer does not violate the ADEA because it lays off an employee qualified only for calculator or computer repairs where the employer is retaining photocopier repairmen.

The Eighth Circuit opinion also states as a factor that Brooks "did have extensive experience with in-shop copier repair." (Appendix A24) The record establishes that Brooks had performed virtually no photocopier work. Monroe's photocopy repair work was performed in the field. (1Tr. p.68, ls.1-4; p.143, ls.3-8; 2Tr. p.23, ls.14-16; p.73, ls.1-15-p.74, l.9) Brooks admitted that, during his entire tenure with Monroe, he made one photocopier service call in the field and, even then, only to assist another who had primary responsibility for the work. (1Tr. p.68, l.25-p.69, l.8) Brooks could not even set up a photocopier. According to Brooks' witness, at the time of Monroe's

greatest need for a photocopier repairman, Brooks' ability with photocopiers was limited to the unskilled task of taking the photocopiers out of the shipping crate at Monroe's office for other persons to set up. (2Tr. p.36, l.24-p.38, l.6) A possible scintilla of evidence cannot support a judgment especially where all other probative evidence, including the plaintiff's witnesses, controverts that mere scintilla. Brooks' unsupported conclusion that he was a photocopier repairman cannot support the judgment below. *See, Smith v. Flax,* 618 F.2d 1062, 1067 (4th Cir. 1980) (the employee's perception of himself is not relevant; it is the perception of the decision maker which is relevant).

The Eighth Circuit's opinion states as a factor that Brooks repeatedly requested to be sent to photocopier repair school and was told to engage in self-study. (Appendix A24) The Eighth Circuit ignored the fact that Monroe instead sent Brooks to IBM computer school which, at the time, was an excellent opportunity. (1Tr. p.72, l 22-p.73, l.4; 2Tr. p.27, l.10-p.28, ls.1-19; 2Tr. p.38, l.13-p.36, l.1) The Eighth Circuit ignored the fact that Monroe similarly did not send B. Taylor, who was younger than Brooks, to photocopier school. (1Tr. p.53, ls.7-15; p.54, ls.13-16; p.100, ls.4-20; 2Tr. p.127, ls.6-13; p.135, ls. 12-15) There is absolutely no evidence that Monroe excluded people of Brooks' age from photocopier repair school. There is no rational inference that age played a role in Brooks' termination arising from the fact that Brooks did not go to photocopier repair school. *Branson v. Price River Coal Co.,* 853 F.2d 768 (10th Cir. 1988); *Ruth v. Allis-Chalmers Corp.,* 40 FEP 1227, 1228 (W.D. Ky. 1986), *aff'd,* 820 F.2d 405 (6th Cir. 1987) (Table).

As a factor the Eighth Circuit states that, after Brooks' discharge, Monroe sent Fred Taylor to a photo-

copier repair school. (Appendix A24) The school was an advanced school. All witnesses testified that, unlike Brooks, Fred Taylor regularly performed major preventative maintenance and service work on photocopiers for Monroe at the customer's place of business, which was the critical function performed for Monroe's photocopier customers. Examples of Monroe's customer repair tickets also proved that Fred Taylor was regularly performing major preventative maintenance work on photocopiers more than eight to nine months before Brooks was terminated. (1Tr. p.81, l.18-p.86, l.17; p.99, ls.2-9; p.145, ls.2-18; p.155, l.15-p.156, l.8; 2Tr. p.7, l.17-p.8, l.2; p.22, ls.15-17; p.23, l.17-p.25, l.11; p.135, ls.6-11; p.150, l.17-p.151, l.17; J.A., pp.108-124, DX52) On the other hand, Brooks was not qualified to attend the advanced photocopy repair school. Age animus cannot be inferred from the employer's failure to afford advanced training to one person who is not qualified for the training.

The Eighth Circuit's opinion also recites as a factor that Tully told Brooks that "we old people have to stick together." (Appendix A24) The alleged statement by Tully, who had worked for Monroe for decades and who was older than Brooks, would literally prove that Tully, who ultimately reviewed and approved Brooks' discharge, would have protected Brooks from any discrimination. This statement was not related to the termination and could not tend to prove any age animus by Tully. *Chappell v. GTE Products Corp.*, 803 F.2d 261, 268, n.2 (6th Cir. 1986), *cert. denied*, 480 U.S. 919, 107 S.Ct. 1375 (1987). While relevant and material workplace comments may be evidence of discriminatory animus under *Liechihman v. Pickwick International*, 814 F.2d 1263, 1271 (8th Cir.), *cert. denied*, 108 S.Ct. 161 (1987) (finding

statements did not establish age animus), Justice O'Connor has recently observed:

> Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 63-69 (1986), cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself suffice to satisfy the plaintiff's burden in this regard.

Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 49 FEP (BNA) 954 (1989) (concurring opinion).

The Eighth Circuit's opinion cites an alleged inconsistency between Sturrock and Leier. (Appendix A25) Sturrock testified that he relayed Tully's order to discharge an employee to Leier and Leier testified that he received his instructions directly from Tully. This immaterial difference in the testimony by two former employees certainly does not tend to prove age discrimination. Brooks' witness Sturrock testified unequivocally that Leier was the person who made the decision to terminate Brooks. (1Tr. p.131, ls.10-22; p.136, l.14-p.137, l.1) Sturrock stated that Leier was the sole and best source of the reason Brooks was selected for discharge. (1Tr. p.131, ls.10-22; p.136, l.14-p.137, l.1) Leier selected Brooks because he was the least senior person without photocopier experience; age was not a factor. (1Tr. p.100, ls.4-20; 2Tr. p.126, l.17-p.127, l.18; p.135, ls.12-18)

Most importantly, the Eighth Circuit does not cite any aspect of the conversations involving Leier or Stur-

rock as reflecting any age animus.[5] An employer is not proven to violate the ADEA simply because two of its former employees testify differently regarding immaterial facts, especially where neither suggests age was a factor in the employer's conduct.

This Court should require that a plaintiff in an ADEA discharge case submit evidence of age animus in order to prevail. This case presents a clear opportunity for the Court to require that the ADEA be applied according to its specific, narrow purpose to prohibit age discrimination and for the Court to establish safeguards to protect against the abuse and misapplication of the ADEA.

CONCLUSION

The Eighth Circuit's decision is incorrect and in conflict with the decisions of other Circuits because (1) it holds that discredited or inconsistent reasons for an employer's action are, by themselves, tantamount to proof of discriminatory intent under the ADEA (conflicting with the First Circuit in *White*, the Fourth Circuit in *Holder*, the Fifth Circuit in *Bienkowski* and the Seventh Circuit in *Pollard*) and (2) it relies upon factors to establish discriminatory intent which do not provide

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5. The Eighth Circuit's opinion refers to Sturrock's allegation that he was told to terminate the highest paid employee. However, the highest paid employee was not terminated. (J.A., p.132) Additionally Sturrock conceded that salary level was not a factor in the retention of the employees. (1Tr. p.133, l.9-p.135, l.19; p.151, l.6-p.152, l.14; p.154, ls.6-13) The district court rejected Brooks' argument in this regard. Appendix A17-18) Monroe set salary "on the basis of merit" (Respondent's Eighth Circuit Brief p.5), not age or length of service. (J.A., p.132) That high seniority is sometimes correlated to high salary (but not here) is irrelevant because Monroe chose to lay off the person without photocopier skills who had the lowest seniority.

significantly probative evidence that the employer's articulated reason was a pretext for age animus and which amount to no more than a possible scintilla of evidence from which the Eighth Circuit made unreasonable inferences (conflicting with the Eleventh Circuit in *Carter*).

The Supreme Court should issue a writ of certiorari to review the judgment and opinion of the Eighth Circuit Court of Appeals and resolve these conflicts among the Circuits on these very important issues which frequently arise in, and are dispositive in, ADEA discharge cases.

Respectfully submitted,

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APPENDIX

(Filed October 2, 1987)

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF
MISSOURI

Docket Number
86-0984-CV-W-8
Honorable Joseph E. Stevens, Jr., Judge

WALTER L. BROOKS,
Plaintiff,

vs.

MONROE SYSTEMS FOR BUSINESS, INC.,
Defendant.

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[x] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered for plaintiff, with plaintiff's actual damages assessed at $44,000.00. It is further adjudged that defendant's violation was not willful.

R. F. Connor, Clerk
/s/ (Illegible) Deputy Clerk

Date October 2, 1987

(Filed September 21, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 86-0984-CV-W-8

WALTER L. BROOKS,
Plaintiff,

vs.

MONROE SYSTEMS FOR BUSINESS, INC.,
Defendant.

ORDER

Plaintiff in the above-styled case sued defendant in two counts alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140. Currently before the court is defendant's motion for summary judgment on both counts.

Brooks began working for Monroe on May 1, 1956. At some point thereafter Brooks temporarily stopped working for Monroe, returning to work in the capacity of a customer service engineer in 1977. He continued in this position until his discharge on August 16, 1985. Brooks was fifty-five years old at the time of his discharge.

Brooks' job entailed the servicing of computer and office equipment sold by Monroe. He primarily serviced

bookkeeping machines although he spent small amounts of time working on computer equipment and calculators. He attended a number of training seminars that focused on the servicing of these types of office equipment. Brooks never serviced copiers as a regular part of his job nor did Monroe send Brooks to any training programs for copiers, although he apparently requested such training.

Sometime in late 1984 or early 1985 Monroe decided to shift its focus from the sale of computer and office equipment to the sale of copying machines. In his deposition Brooks said that he was aware of this change in emphasis and that he realized the company had hired additional personnel to service only copying equipment. Brooks never worked with the copier specialist although two other employees did.

In its memorandum in support of summary judgment Monroe argues that Brooks was discharged because he was the employee with the least amount of continuous service who did not have copier training. Monroe noted that two of the three customer service engineers retained by defendant after plaintiff's discharge, Ronald L. Cunningham (forty-nine years old), and Harold Sechrest (thirty-four years old), had experience in the repair and servicing of photocopiers. Only Byron Taylor (forty years old) had no experience with copiers. Taylor, however, had continuously worked for Monroe longer than Brooks had. Thus, Monroe relies primarily on the proposition that the company made a business decision to focus on computers and, consequently, Brooks' discharge was based on a legitimate business reason.

Brooks also claims that his termination violated the provisions of section 510 of ERISA. Specifically, he

claims that Monroe discharged him to avoid full vesting of his pension.[1] On September 14, however, Monroe's counsel informed plaintiff that Monroe miscalculated Brooks' pension and that he was 100 percent vested at the time of his discharge. Monroe denies that the discharge had anything to do with Brooks' pension and reasserts that Brooks was discharged for his lack of copier training.

ADEA Claim

Before ruling on defendant's motion the court notes that in order for Brooks successfully to oppose the summary judgment motion he must "set forth specific facts showing a genuine issue for trial." *Leichahman v. Pickwick International*, 814 F.2d 1263 (8th Cir. 1987). In making the determination as to whether Brooks has met this burden the court must consider that "summary judgments should be sparingly used and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion." *Hillebrand v. M-Tron Industries, Inc.*, No. 86-5481, slip op. at 2 (8th Cir. August 27, 1987). In addition, we note that "summary judgments should seldom be used in cases alleging employment discrimination because of the special category in which Congress and the Supreme Court visualize these cases." *Id.* at 2-3.

Defendant argues that Brooks cannot prove a prima facie case and, therefore, Monroe is entitled to judgment

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1. At the time of his discharge Brooks apparently thought he was either sixty or eighty percent vested. Defendant's initial motion for summary judgment states that he was sixty percent vested, its response to plaintiff's opposition motion states that he was eighty percent vested. *See* Defendant's Motion for Summary Judgment at 3 and Defendant's Reply Memorandum to Plaintiff's Suggestions in Opposition to Defendant's Motion for Summary Judgment at 10.

as a matter of law. Traditionally, a plaintiff in an ADEA suit presents a prima facie case when he or she shows "(1) that he or she is within a protected age group, (2) that he or she met applicable job qualifications, (3) that despite these qualifications, he or she was discharged, (4) that, after the discharge the position remained open and the employer continued to seek applications from persons with similar qualifications." *Cova v. Coca Cola Bottling Company*, 574 F.2d 958, 959 (8th Cir. 1978). The Eighth Circuit has stated that in addition to the four requirements noted above "some additional showing should be necessary to make a prima facie case in a reduction in force situation." *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161, 1165 (8th Cir. 1985). Specifically, the court held that a plaintiff in an age discrimination suit "must come forward with additional . . . evidence that age was a factor in his termination" when the employer alleges that an individual was discharged as part of a reduction in force. *Id.* at 1166 (quoting *LaGrant v. Gulf & Western Manufacturing Co., Inc.*, 748 F.2d 1087, 1091 (6th Cir. 1984)). The court is convinced that plaintiff's complaint and the motion papers filed put at issue facts which could lead a jury to find that age was a factor in his termination. As a result, Monroe's motion for summary judgment must be denied.

The court accepts Brooks' argument that there is a genuine fact issue and while no direct evidence of discrimination exists, the circumstantial evidence will point to the fact that the company's new emphasis on copier sales may have been a pretext to hide Monroe's discriminatory motive. Specifically, plaintiff claims that the fact that two younger men with less seniority were retained as customer service engineers is a circumstance tending to show that the business decision excuse is pretextual.

Monroe argues that these individuals had more experience with copiers than did Brooks. While Monroe's argument may on its face offer a legitimate reason for the discharge, Brooks' additional argument that he had asked to be sent to copier school and was denied, coupled with the fact that a younger employee was sent to copier school immediately after the discharge, leads the court to believe that a factual dispute exists. Similarly, all but one of plaintiff's job evaluations[2] were marked "outstanding" (the highest rating), in contrast to those of at least one of the employees retained to work as a customer service representative.[3] Plaintiff's Statement of Controverted and Uncontroverted Facts, No. 6. Finally, evidence exists that a new computer salesman was hired by defendant shortly after plaintiff's discharge. It follows that the court must deny the motion for summary judgment on Count One since a genuine issue of fact exists as to whether age was a motivating factor in Monroe's decision to discharge Brooks.

ERISA Claim

Monroe also moves for summary judgment on Brooks' ERISA claim. Section 510 of ERISA states that it is un-

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2. One evaluation, which is undated but was apparently written just after the decision had been made to discharge Brooks, rated him as "good" (the middle rating of five possibilities). Plaintiff's Statement of Controverted and Uncontroverted Facts, No. 5. The only weakness listed on this evaluation was Brooks' lack of copier training.

3. Four months before Brooks' termination Brian Munsell received a rating of "excellent" (the second best of the five possibilities). The evaluation also stated that additional training on copiers was required to further develop Munsell's skills. It should be noted that Munsell was a customer service representative (CSR) rather than a customer service engineer (CSE). CSRs are one step below CSEs in Monroe's organizational hierarchy.

lawful for any person to discharge or discriminate against a participant in an employee benefit plan. 29 U.S.C. § 1140. To prevail on this claim, then, Brooks must show that Monroe intended to violate ERISA by discharging him. The court recognizes that it "must be particularly cautious in deciding whether to grant summary judgment where issues of intent or motivation are involved." *Baker v. Kaiser Aluminum and Chemical Corp.*, 608 F. Supp. 1315, 1319 (N.D. Cal. 1984). *Accord Suburban Teamsters of Northern Illinois Health, Welfare and Pension Funds v. Callaghan Paving, Inc.*, 583 F. Supp. 105, 110 (N.D. Ill. 1984). The court finds, however, that summary judgment is appropriate in this case.

Section 510 of ERISA was "aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980). As a result, a plaintiff whose pension rights were fully vested at the time of discharge "cannot maintain that [a] defendant fired him in order to prevent plaintiff from obtaining vested pension rights." *Corum v. Farm Credit Services*, 628 F. Supp. 707, 717 (D. Minn. 1986). *Accord Donohue v. Custom Management Corp.*, 634 F. Supp. 1190 (W.D. Pa. 1986). Since Monroe has now determined that Brooks was fully vested at the time of his discharge, summary judgment is appropriate on Count II of Brooks' complaint.

Accordingly, it is

ORDERED that defendant's motion for summary judgment on Count I of plaintiff's complaint is denied. It is further

ORDERED that defendant's motion for summary judgment on Count II of plaintiff's complaint is granted.

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.
United States District Judge

September 21, 1987

(Filed May 19, 1988)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 86-0984-CV-W-8

WALTER L. BROOKS,
Plaintiff,

vs.

MONROE SYSTEMS FOR BUSINESS, INC.,
Defendant.

ORDER

Plaintiff in the above-styled case sued defendant for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 623. The case was tried before a jury for four days beginning on September 28, 1987. The jury returned a $44,000 verdict in favor of plaintiff. The case is currently before the court on defendant's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

Plaintiff first began working for defendant on May 1, 1956. He left this employment on two different occasions, once in 1974 for one and a half months and again in 1977 for approximately four months. Plaintiff returned to Monroe in December 1977. Plaintiff's Exhibit 31. The December 1977 hire date was the seniority date used by Monroe to compute plaintiff's seniority for

the discharge at issue in this case.[1] The company contends that plaintiff was discharged as part of a one person reduction in force in its Kansas City service office. According to testimony by Monroe executives, Brooks was chosen to be discharged because he was the least senior employee without formal copier repair training.

At the time of the discharge in August 1985 five other individuals worked with plaintiff in the service department: Ronald Cunningham, Byron Taylor, Harold Sechrest, Fred Taylor, and Brian Munsell. Defendant's Exhibit 61 illustrates the age, salary and seniority dates of each of these individuals at the time of Brooks' termination:

Name	Age	Salary	Date of Hire
Walter Brooks	54	$411/week	Dec. 1977
Ronald Cunningham	49	401/week	Dec. 1959
Byron Taylor	38	405/week	Aug. 1975
Harold Sechrest	34	421/week	April 1973
Fred Taylor	34	230/week	April 1984
Brian Munsell	25	246/week	Jan. 1984

At the time of his discharge Brooks was a customer service engineer (CSE). This job was the highest position an individual could attain in defendant's service department. Cunningham and Taylor were also classified as CSEs while Munsell was classified one step

1. Although plaintiff argues in its opposition to defendant's motion that Monroe never had a written or oral policy regarding seniority and whether breaks in service should be considered in determining seniority dates, the parties agreed at trial that the 1977 seniority date was correct. *See* Defendant's Exhibit 61, which was admitted without objection.

below them as a customer service representative (CSR). Fred Taylor was a trainee and Sechrest, who had previously been the company's regional manager, was the department's service manager.[2]

In June 1985 the company had discontinued its computer line because of poor sales. Copier sales, on the other hand, had doubled between 1984 and 1985. Thus, at the time of Brooks' discharge the company was concerned with maintaining its copier repair service force to meet the demand generated by increased sales.

Although very little evidence was presented about the job performance of Byron Taylor, Fred Taylor, or Brian Munsell, two witnesses testified that Cunningham was not an exemplary employee. Clay Sturrock, the district manager, testified that Cunningham often had to make repeat calls because he did not completely repair copiers on the first try. He also stated that the company lost at least one repair contract because of Cunningham's poor work. Sechrest corroborated this testimony, noting that Cunningham was only a "fair" copier repairman and that customers had complained about his work.

Brooks rarely repaired copiers. He testified that he spent five to ten percent of his time doing computer repair work and the remainder of his time repairing calculators and accounting machines. Brooks had been formally trained to service calculators and accounting machines but had never received any formal copier repair training.

Unlike Brooks, Cunningham, Munsell and Sechrest spent the majority of their time performing "preventive

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2. Sechrest was demoted to the service manager position in 1985.

maintenances" on copiers. A preventive maintenance consists of an overall copier repair job. While these three men performed the majority of all copier repairs, Brooks and Byron Taylor, who had a higher seniority date than Brooks, concentrated on all other repairs performed by Monroe.

Brooks testified at length on the issue of his formal copier and computer training. On direct examination Brooks testified that he often asked Mr. Clark, a regional manager,[3] if he could go to copier repair school. He said that whenever he asked about attending school, Clark would tell him he could read the books and learn without attending school. As a result, Brooks testified that he trained himself by reading repair books rather than by attending school.[4] Brooks also testified that when the company hired a copier specialist, the specialist worked only with Munsell although Brooks would have liked to work with him as well.

On cross-examination Brooks admitted that he never asked Gerald Tully, the regional service manager based in Chicago or Tony Leier, the service manager in Kansas City, if he could attend copier school.[5] Brooks explained that he never had an opportunity to ask Leier about school, since Leier did not become service manager until a month and a half before Brooks' discharge, although he did not say why he did not ask Tully about school.[6]

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3. Mr. Clark managed the Southern region. Kansas City was part of the Southern region before it was transferred to Mr. Tully's region, which was based in Chicago, in early 1985.

4. Monroe did send Brooks to an IBM computer repair school towards the end of his employment with the company.

5. Leier also testified that Brooks never requested copier training.

6. The court notes that Kansas City was not part of Tully's region until early 1985 so plaintiff did not have a great number of chances to ask him about attending school.

In addition to Brooks' testimony on this point, Harry Sechrest, the service manager in Kansas City, testified that he was not allowed to send Brooks to copier school. Sechrest, like Clark, told Brooks to read the manuals and learn to repair the copiers on his own.

Clay Sturrock, the district manager, was in charge of all operations in Monroe's Kansas City branch. Sturrock testified that he made the decision to terminate Brooks.[7] Sturrock explained that Tully told him in late July or early August of 1985 to fire one person in the Kansas City service department. According to Sturrock's testimony the reduction in force was necessary as part of a company austerity program and he was told to consider only the highest paid employees in determining which service person to discharge. Sturrock narrowed his decision to Walter Brooks and Ron Cunningham because they were the two individuals with the highest salaries.[8] After narrowing his choices to these two individuals, Sturrock chose Brooks because Cunningham had previous work experience on copiers and Brooks did not. Sturrock also considered the fact that Brooks' experience centered on computer repairs and the company had decided to cut back on computer sales.

Gerald Tully, the regional field engineering manager, began supervising the Kansas City region in early 1985. He emphatically denied ever telling Sturrock to consider only the highest paid individuals when deciding which

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7. Other witnesses contradicted this testimony. *See, infra,* at 6.

8. Sechrest had a higher salary than either of these two but presumably was not considered because of his position as service manager.

service department employee to terminate.[9] In fact, he testified that he never spoke with Sturrock at all and that all of his communications with the Kansas City office were through Leier.

According to Tully's testimony, Tully called Leier and told him one position would have to be eliminated. Approximately four or five days after this conversation, Leier called Tully and told him that Brooks had been selected for discharge. When Tully asked why Brooks had been selected, Leier said that the decision was between Byron Taylor and Walter Brooks because neither man had any copier training. Tully testified that neither age nor salary was ever mentioned in this conversation. He also testified that he was not concerned that Brooks, a customer service engineer, would be terminated instead of a lower ranking, customer service representative since Brooks did not have the copier repair experience that the other servicemen had.

Leier also testified that he was the individual ultimately responsible for the decision to terminate Brooks. In making that decision he said he considered the number of copy machine and calculator service calls made by each of the department's employees.[10] He also corroborated Sturrock's testimony that salary was never considered in deciding which employee to discharge. He said that Brooks was discharged because he was the least senior employee without copier repair experience and that a primary consideration in the decision was the fact that the company did not want to discharge an experienced copier repair person.

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9. Tully testified that he never would have told anybody to base a discharge decision on salary since salary does not correlate with experience or talent.

10. Brooks admitted he rarely made copier service calls.

Defendant makes two arguments why no reasonable jury could have entered a verdict against defendant on plaintiff's age discrimination claim. First, defendant argues that plaintiff failed to establish any factual basis from which a jury could infer that age was a determining factor in Brooks' termination. Specifically, defendant argues that no evidence was presented to support plaintiff's theory that he was terminated because his salary, which was higher than that of other employees, was tied to his age. Defendant also argues that it showed that plaintiff was terminated for a legitimate reason, his lack of copier experience, and that plaintiff did not prove that this reason was merely pretextual.

In considering defendant's motion for judgment notwithstanding the verdict this court must consider "[t]he evidence together with all reasonable inferences to be drawn therefrom . . . in the light most favorable to plaintiff, as the party prevailing with the jury." *Floyd v. Kellogg Sales Co.*, No. 87-5067, slip op. at 5 (8th Cir. Mar. 4, 1988). The Eighth Circuit has noted that a district court considering a j.n.o.v. motion

> must: 1) consider the evidence in the light most favorable to [the party] who prevailed with the jury; 2) assume that all conflicts in the evidence were resolved by the jury in [that party's] favor; 3) assume as proved all facts which [that party's] evidence tends to prove; 4) give [the prevailing party] the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and 5) . . . [deny] . . . the motion if reasonable persons could differ as to the conclusions to be drawn from it.

Gilkerson v. Toastmaster, Inc., 770 F.2d 133, 136 (8th Cir. 1985). Thus, this court may grant defendant's mo-

tion for judgment notwithstanding the verdict only if it finds that the evidence, when construed in favor of Brooks, is not susceptible to any inferences which would sustain Brooks' position.

The standard for deciding whether to grant a new trial is less stringent. In making such a decision "the trial court, after reviewing all of the evidence, must exercise its independent judgment, in determining whether the verdict was against the clear weight of the evidence." *Lincoln Carpet Mills, Inc. v. Singer Co.*, 549 F.2d 80, 82 (8th Cir. 1977). In making this determination the district court "can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.'" *Ryan by Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 387 (8th Cir. 1984) (quoting *McGee v. South Pemiscot School District R-V*, 712 F.2d 339, 344 (8th Cir. 1983)). In considering these factors the court cannot, however, "simply . . . substitute its judgment for the jury's granting a new trial whenever it would find differently than the jury has." *Id.*

As noted above, defendant advances two separate arguments as to why a judgment notwithstanding the verdict is proper. First, defendant argues that plaintiff failed to establish any evidence in support of his theory that defendant's salary policy was somehow correlated to an employee's seniority and age. Plaintiff supported this theory with two Eighth Circuit cases: *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983) and *Dace v. ACF Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983). In *Leftwich*, the Eighth Circuit held that a cost-reduction plan "intended to reduce costs by eliminating some positions at the college for tenured faculty who

were generally higher paid than untenured faculty" had an adverse effect on older faculty members. 702 F.2d at 691. As a result, the court held that the use of salary as a criteria for determining who was discharged was a "facially neutral employment practice" which "operate[d] to exclude from a job a disproportionate number of persons protected by the ADEA." *Id.* at 690. The court concluded that "because of the close relationship between tenure status and age,[11] the plain intention and effect of defendant's practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts." *Id.* at 691.

In *Dace*, the Eighth Circuit held that the *Leftwich* "rationale is equally applicable when seniority instead of academic tenure is used as a basis for adverse employment action." 722 F.2d at 378. Plaintiff in *Dace* introduced evidence which showed that defendant would save money by demoting plaintiff rather than a younger employee with less seniority. *Id.* at 375.

No such testimony was presented in the present case. Indeed, unlike the situations in either *Dace* or *Leftwich*, plaintiff in the present case did not present any correlation between seniority and salary. As noted earlier, Ronald Cunningham had the longest seniority with the company, but was the fourth highest paid individual and the second oldest. Similarly, Harold Sechrest, who was one of two thirty-four-year-old employees in the service department, sharing the rank of fourth oldest, had the highest salary at $421 per week although he was only second in seniority. Brooks, the oldest employee, had

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11. Plaintiff established this relationship through statistical evidence.

the second highest salary but was fourth in line on the basis of seniority.

Not only does this evidence establish that plaintiff failed to show the type of link between seniority and age that was central to the court's decision in *Dace*, it clearly establishes that the present case is factually distinct from that presented to the court in *Dace*. Plaintiff in *Dace* was demoted because he was among the most senior employees. Plaintiff in the present case, on the other hand, ranked fourth out of six employees in terms of seniority. There simply is no correlation between the two situations. As a result, the court agrees with defendant's argument that no reasonable jury could have inferred that plaintiff was discharged because of an impermissible relationship between his seniority and his salary.

The court cannot reach the same result, however, in regard to defendant's argument that no reasonable jury could infer that plaintiff's lack of copier experience was used as a pretext to fire plaintiff because of his age. Defendant argues that plaintiff did not establish a prima facie case of age discrimination because he was not able to show that defendant's articulated reason for the discharge, that the company had decided to emphasize its copier sales while eliminating computer sales, was a pretext for age discrimination. Defendant is correct in noting that "[w]hile an employer's judgment may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was [a] pretext for legal discrimination." *Clay v. Hyatt Regency Hotel*, 724 F.2d 721, 725 (8th Cir. 1984).

Defendant relies heavily on *Ruth v. Allis-Chalmers Corp.*, 40 F.E.P. 1227 (W.D. Ky. 1986), *affirmed without*

opinion, 820 F.2d 405 (6th Cir. 1987) and *English v. Pabst Brewing Co.*, 828 F.2d 1047 (4th Cir. 1987). Plaintiff in *Ruth* alleged that he had been discriminated against on the basis of age when he was not considered for a regional sales manager position after his own position as manager of field office administration was eliminated. *Id.* at 1228. Plaintiff in *Ruth* "did not protest the elimination of his job or request consideration as a candidate for a Regional Sales Manager position" at the time his previous position was eliminated. *Id.* at 1228. He did not apply for the job until after his previous position was eliminated. At that point he said he believed that he was qualified for the regional manager position because he was familiar with the company's product line and he could update himself on other aspects of the job by taking a six-month refresher course. *Id.* at 1229. Defendant argued that it based its decision on the fact that it did not want to spend the money necessary to relocate and train plaintiff for the regional manager job. *Id.* The court held that the company's decision not to train plaintiff for the new job was not evidence which "would lead a reasonable jury to find that he was discharged . . . because of his age." *Id.* at 1229.

Plaintiff in *English* was discharged when Pabst restructured its sales force and eliminated certain product lines. As part of this restructuring, field work previously handled by plaintiff was to be performed over the telephone by employees at headquarters. 828 F.2d at 1048. In addition, one of the products sold by plaintiff, malt syrup, was dropped by the company. *Id.* at 1051. The court held that plaintiff had not "presented any evidence to show that his termination was the result of age discrimination" and found that the defendant had

eliminated plaintiff's position as part of a restructuring and not because of discrimination. *Id.*

The factual situation presented by plaintiff in the present case differs from those presented by plaintiffs in either *Ruth* or *English*. Unlike the plaintiff in *Ruth*, who never requested that he be considered for a regional sales manager position, plaintiff in the present case presented evidence that he repeatedly requested to be sent to copier school. In addition, defendant in the present case sent Fred Taylor to copier repair school immediately after plaintiff's discharge so there was no question of a company not wanting to spend additional money. There was also evidence in the present case, unlike *Pabst*, that defendant retained employees with poor performance records rather than provide training on a new product line. Although the court believes these distinctions are small, the court cannot say that no evidence exists to support plaintiff's position when the evidence is construed in a light most favorable to plaintiff.

Although the court has more leeway in deciding whether to grant defendant's alternative motion for a new trial, it cannot grant a new trial simply because it would have reached a result different from that reached by the jury. *Ryan*, 734 F.2d at 387. Even considering the obstinate testimony of Sturrock, in which the court puts little credibility, the fact remains that evidence exists that defendant repeatedly failed to provide plaintiff with requested training, thereby leaving him in a position where he was unskilled in servicing the company's primary product. Accordingly, it is

ORDERED that defendant's motion for judgment notwithstanding the verdict is denied. It is further

ORDERED that defendant's alternative motion for a new trial is denied.

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.
United States District Judge

May 19, 1988

(Filed April 26, 1989)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1917

Walter L. Brooks,
Appellee,

v.

Monroe Systems for Business, Inc.,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 15, 1988
Filed: April 26, 1989

Before BOWMAN and MAGILL, Circuit Judges, and HANSON,* Senior District Judge.

MAGILL, Circuit Judge.

Walter Brooks sued his former employer, Monroe Systems for Business, Inc. (Monroe), claiming he had been discharged because of his age, contrary to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1982). The jury found for Brooks, and the district court denied Monroe's motions for judgment not-

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*The HONORABLE WILLIAM C. HANSON, Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

withstanding the verdict and for a new trial. Monroe now appeals to this court, and we affirm.

I.

In 1985, Brooks, then 54, was the oldest of six servicemen repairing and maintaining office machines in the service department of Monroe's Kansas City, Missouri district office. During the summer of 1985, Monroe ordered a reduction in its service labor force. Gerald Tully, regional services operations manager, chose to reduce forces in the Kansas City district of his region. Clay Sturrock, manager of the Kansas City district, testified that Tully instructed him to terminate the highest paid service employee in Kansas City, and that he relayed this information to the district service manager, Anthony Leier. Leier testified that he was instructed by Tully directly to reduce the service staff by one, that Tully did not offer any criteria for the decision, and that Leier chose to discharge Brooks because he was the least senior employee without photocopier training. Brooks was discharged in August of 1985.

Monroe contends that as a matter of law, Brooks failed to establish that age was a determining factor in his discharge, or that the proffered reasons for Brooks' discharge were pretextual. Monroe also claims that Brooks failed to plead and prove that he had met the administrative filing requirements of the ADEA.

II.

In reviewing the verdict, our role is to ascertain whether the record contains evidence from which a reasonable fact finder could have concluded that age discrimination was a determining factor in Brooks' dismissal.

Gilkerson v. Toastmaster, Inc., 770 F.2d 133, 135 (8th Cir. 1985). In assessing the sufficiency of the verdict, we must (1) consider the evidence in the light most favorable to Brooks, the prevailing party; (2) assume the jury resolved evidentiary conflicts in Brooks' favor; (3) assume as proved all facts which Brooks' evidence tends to prove; and (4) give Brooks the benefit of all favorable inferences which may be reasonably drawn from the facts proved. *Gilkerson*, 770 F.2d at 136.

Although this is a close case, we conclude that there was sufficient evidence to support the jury's verdict in Brooks' favor. Brooks was described by Sturrock as "an excellent worker" and he received high performance ratings in each of the four years before his discharge. Brooks' field experience with copier repairs was limited but he did have extensive experience with in-shop copier repair. Brooks had repeatedly requested to be sent to copier repair school; he was told to engage in self-study. After Brooks' discharge, Monroe sent another employee, Fred Taylor, to a photocopier repair school. Brooks testified that on one occasion Tully told Brooks, "We old people have to stick together," to which Brooks replied, "Talk for yourself." While Sturrock testified that he relayed Tully's order to discharge an employee to Leier, Leier testified that he received his instructions directly from Tully.

In reviewing the verdict, we address the ultimate factual issue of whether Monroe discriminated against Brooks on account of age. Although no single piece of Brooks' indirect evidence proves discrimination, the evidence viewed in its entirety was sufficient to support the jury's verdict. The jury could, and apparently did, disbelieve Monroe's proffered reason for Brooks' dis-

charge, i.e., that he lacked training, when his requests for training were turned down and another employee received training after Brooks' discharge. Submission by an employer of a discredited reason to discharge is itself evidence of discriminatory motive. *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988). The inconsistencies between the testimony of Monroe's employees (Sturrock and Leier) over the reasoning and procedure in deciding to fire Brooks might also persuade a jury to infer that the proffered reason was pretextual. *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 378 n.8 (8th Cir. 1983) (discrepancies support jury's disbelief in proffered reason for discharge); *cf. Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101 (8th Cir. 1988) (change in proffered explanation supports inference that reasons are pretextual). And while a single reference to age does not necessarily prove an intent to discriminate, in context of all the facts it may be evidence of discriminatory intent. *Leichihman v. Pickwick International*, 814 F.2d 1268, 1271 (8th Cir. 1987).

III.

Monroe argues that it is entitled to judgment because Brooks failed to plead and prove that he filed a charge with the Equal Employment Opportunity Commission (EEOC). Monroe contends that in the absence of such pleading and proof, Brooks has failed to state a claim upon which relief can be granted.

The ADEA states that a civil action may not be commenced until sixty days after a charge alleging unlawful discrimination has been filed with the EEOC. 29 U.S.C. § 626(d) (1985 and Supp. 1988). We view the administrative filing requirement as a condition prec-

edent to suit subject to the pleading requirements of Rule 9(c) of the Federal Rules of Civil Procedure. *Stearns v. Consolidated Management, Inc.*, 747 F.2d 1105, 1110-11 (7th Cir. 1984). For a plaintiff to properly plead performance of conditions precedent, "it is sufficient to aver generally that all conditions precedent have been performed or have occurred." Fed. R. Civ. P. 9(c). Brooks' complaint does not allege that the requisite administrative filing has been made. Monroe, however, ignored the Rule's plain requirement that "denial of performance or occurrence shall be made specifically and with particularity." *Id.* "Rule 9(c) has the effect of forcing defendant to raise the issue whenever he believes there actually is a question about performance." 5 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1304 (1969).

Monroe contends that it raised the issue of non-performance by asserting Brooks' failure to state a claim upon which relief can be granted in both its answer and its motion for a directed verdict. However, Monroe's mere assertion of "failure to state a claim" was not specific enough to join the issue. *Cf. EEOC v. Standard Forge & Axle Co.*, 496 F.2d 1392, 1395 (5th Cir. 1974) (Title VII defendant should follow Rule 9(c) to join issue on satisfaction of conditions precedent). Although Monroe added a citation to § 626(d) to its contention that Brooks had failed to state a claim in its motion for judgment notwithstanding the verdict, the defense of failure to state a claim must be raised at the latest at trial on the merits. Fed. R. Civ. P. 12(h)(2). Monroe waived this defense by not identifying the basis for its claim in timely fashion. *Black, Sivalls & Bryson v. Shondell*, 174 F.2d 587, 590-91 (8th Cir. 1949).

IV.

For the foregoing reasons, we affirm the order of the district court upholding the judgment in Brooks' favor.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(June 5, 1989)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1917-WM

Walter L. Brooks,
Appellee,

vs.

Monroe Systems for Business, Inc.,
Appellant.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appellant's petition for rehearing with suggestion for rehearing en banc is denied on the basis that it is untimely.

Petition for rehearing by the panel is also denied.

June 5, 1989

Order Entered at the direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court
of Appeals, Eighth Circuit.